IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 550 OF 2006

1. M/s. Prakash Engineers and 2 ors.] .. Petitioners

Versus

1. The Municipal Corporation of Greater Bombay and 10 ors.] .. Respondents

Mr. Sanjay Jain with Mr. Nivit Srivastava for the petitioners.

Mr. D.H. Mehta with Mrs. P.A. Purandare for the respondent No.1.

CORAM: F.I. REBELLO &
ANOOP V. MOHTA, JJ.

DATED: 07TH MARCH, 2006

P.C. :

. Petitioners have handed over draft amendment. Draft amendment allowed. Amendment to be carried out within two week from today.

2. It is a case of the petitioners that they fall in AA category of contractors registered with respondent No.1. Their registration is valid till 31st December, 2007. Respondent No.1 has also issued Exemption Certificate dated 1st June, 2004 in their favour.

3. Respondent No.1 invited sealed tenders on percentage basis from eligible contractors for "Petty Remedial Measure Works and Desilting of Sewer Lines for Improvement of Sewerage System in Greater Mumbai for the Year 2005-2007" from contractors registered with respondent No.1. The tender notice was amended by corrigendum No.4 bearing No.CH.E.SO/3676. The date of sale of tenders was 3rd January, 2006 to 16th January, 2006 and the submission of the tenders was to be by 17th January, 2006. In terms of the tender document, the Tenderer had to quote as a percentage below the estimated cost which was Rs.1 crore for each of the specific works. There were altogether 9 specific works. In the event the percentage quoted by a Tenderer for a specific work where standing deposit paid by Municipal registered contractor falls short of 1% of Earnest Money Deposit (EMD), Municipal contractors had to pay the difference being 1% of EMD and standing deposit. Petitioner was one of the Tenderers who submitted his tender for each of the 9 specific works. It is a case of the petitioners that the petitioners bid was not forwarded to the Tender Committee and there is an averment by the petitioners that the same has been done to favour respondent No.6. The petitioners' bid, it is set out, has not been forwarded for further

consideration on the ground that the petitioner had not paid the additional EMD. On 2nd February, 2006, the petitioner made a representation to the Deputy Municipal Commissioner of respondent No.1. It is a case of the petitioner that the Deputy Municipal Commissioner of respondent No.1 passed an order directing the concerned Officer to take the opinion from CA(F)WSSD or the Law Officer and place the same before the Tender Committee. On 10th February, 2006, petitioners made representation to the Municipal Commissioner seeking justice. A further representation was made to the Municipal Commissioner pointing out that in respect of other tenders also, contractors were allowed to quote for separate works with single Exemption Certificate. A Municipal Councillor had also made similar representations to the Municipal Commissioner - respondent No.1. On 17th February 2006, the Tender Committee considered only the bid of respondent No.6 even though petitioner is the lowest bidder and qualified in all respects. The petitioner once again made a representation to the Municipal Commissioner, but as he received no response, the present Petition.

4. At the hearing of this Petition on behalf of the petitioners it is principally contended as under:

(i) That the requirement of paying the amount short of 1% EMD and standing deposit only means that the petitioners had to pay only in the event there was no standing deposit of 1% of the EMD amount. As an illustration, if the estimated cost was Rs.20,00,000/-, the EMD was 1% which will be Rs.1,00,000/-. The petitioners had a standing deposit of Rs.7,50,000/-. One percent of the EMD would be Rs.1,000/-. There was no requirement of the petitioner making good any shortage between the standing deposit and the EMD. The petitioner had bid for 9 specific works, each work by Rs.20 lakhs and the EMD of each work was Rs.1,00,000/-. The petitioner at the highest had to deposit Rs.9,000/- when he already had Rs.7,50,000/- standing deposit. It is further submitted that the respondent No.1 has acted arbitrarily inasmuch as other contractors similarly situated like the petitioners who had bid for all 9 contracts and who had not given the difference between the standing deposit and the EMD in their case, their tenders have been accepted and thirdly it is pointed out that when the petitioners tender was accepted the sealed cover containing the tender bid in the A cover was opened and once that be the case, it was not open to the respondents to reject the petitioner’s tender.

5. At the outset, considering that these are

projects of public importance and had to be carried out on priority, we directed counsel appearing for respondent No.1 to produce before us the Minutes of the meeting of the Tender Committee wherein the tenders were considered. The Minutes have been placed before us. From the Minutes, it is seen that first, A packets were opened on 17th January, 2006. Out of 26 bidders, 25 bidders were found responsive and the B packets were opened on 27th January, 2006. After opening the tenders, it was found that nine bidders had quoted for all the 9 works which included the petitioners herein. The Minutes note that as per tender condition all tenders must be accompanied by an attested copy of EMD deposit receipt paid. The contractors having standing deposit with M.C.B.M. of an amount equal to or more than EMD payable for the works quoted are exempted from payment of EMD. However, they are required to pay the difference between the standing deposit and EMD which falls short. Six bidders who had quoted for all the 9 works had standing deposit with the BMC of Rs.7,50,000/-. For the 9 works EMD amount had to be Rs.9,00,000/- and as such, they had to pay the difference of Rs.1,50,000/-. They had failed to pay the same. It is thus clear that the allegation by the petitioners that other similarly placed AA contractors, their bids were accepted, is contrary to the record as

alongwith the petitioners, five other AA contractors who had bid for all 9 works their tenders were rejected as the EMD fell short of Rs.9,00,000/- as they had only a standing deposit of Rs.7,50,000/-. That contention, therefore, be rejected.

6. The other contention was that after the A packet was opened, it was not open to the respondent No.1 to have rejected the petitioner's tenders. From the Minutes it can be seen that the B packets which had to contain the EMD receipt and the various bids were opened only on 27th January, 2006, whereas A packet was opened on 17th January, 2006. It is only on opening of B packets that the respondent No.1 would have knowledge for how many specific works the bidders had bid. In these circumstances, merely because the A packet was opened would not mean that the requirement of deposit was waived by respondent No.1. There was no such provision as there were bidders who complied with the requirements. In these circumstances, in our opinion that contention must also be rejected.

7. We then come to the first contention which is the main contention which has been urged on behalf of the petitioners. The relevant clause is Clause D which reads as under:

> "Does not pay the Earnest Money Deposit by the previous working day of submitting the tender and submit attested copy of the receipt alongwith the tender. E.M.D. at the rate of 1% of the estimated cost in the form of D.D. shall be submitted. The Tenderers registered with M.C.G.M. who have paid revised Standing Deposit are exempted from payment of E.M.D. However, in case of specific works, where Standing Deposit paid by municipal registered contractors falls short of 1% of E.M.D. Municipal contractors will have to pay the difference between 1% of E.M.D. and Standing Deposit."

. From the above, a plain reading would give rise to the following situation:

(i) Tenderers, not having standing deposit with respondent No.1, but otherwise are eligible could submit their tenders for specific works by depositing an EMD of Rs.1,00,000/- for each of the specific work.

(ii) The Tenderers registered with respondent No.1 who had paid revised Standing Deposit are exempted from payment of EMD. This appears normally not to apply to specific works as specific work as provided thereafter.

(iii) In case of specific works, if the standing deposit falls short of 1% of EMD the contractor has to pay the difference between 1% of EMD and standing

deposit.

. The submission of the petitioners is that the expression 1% of EMD means 1% of Rs.1,00,000/- and, therefore, the petitioners having a standing deposit of Rs.7,50,000/- need not have to deposit any additional amount and hence no requirement of producing EMD receipt. It is also pointed out that this has been so understood by the Municipal Authorities throughout as also other contractors and in fact it is the customary practice followed by the contractors.

8. Firstly, no material has been placed on record before us to show that there is any such customary practice or such practices attained the form of custom or the clause has been so understood. On the contrary, from the Minutes prepared by the Tender Committee, it would be clear that what they understood by the requirement of EMD was that a Tenderer had to deposit the difference between the standing deposit and EMD. In other words, if EMD was Rs.9,00,000/- and standing deposit was Rs.7,50,000/-, then the contractor had to deposit the additional Rs.1,50,000/-. This is based on the Minutes as prepared by the Tender Committee which is recorded in the documents produced before us.

9. If the argument of the petitioners is to be accepted, it would mean that insofar as registered contractors with the first respondent whether they be AA contractor or any other contractor even of the lowest rank whose standing deposit is Rs.45,000/-, will not have to deposit any amount whereas those who do not have a standing deposit, if they bid for all 9 specific works, will have to deposit Rs.9,00,000/-. The entire object of giving an EMD is to ensure that the respondent has some security with it from the bidders for due compliance of the terms of the contract. Further, the expression "short of 1% of EMD" has to be correctly understood. Correctly understood it means if the amount of deposit is short by an amount of not less than 1% of the EMD, then the difference between the standing deposit and the EMD will have to be deposited. It could never mean that it is 1% of EMD deposit. The only rational way to consider the clause and the object of giving EMD. would mean that considering the requirment of 1% of EMD, if there be a shortage in the standing deposit, then the difference between the standing deposit and EMD has to be deposited. This is how the Corporation has also intended.

9. We are clearly, therefore, of the opinion that the contention as urged on behalf of the petitioners is

devoid of merit and consequently, we dismiss the Petition.

10. Though it has been contended that the entire action was to help respondent No.6, the terms of the tender provide that one contractor can be given one part, meaning one contract for a specific work and in a special case, another contract. No Tenderer can get all the 9 contracts. The allegations, therefore, against respondent No.6 are devoid of merit.

11. For the aforesaid reasons, there is no merit in the Writ Petition which is accordingly dismissed. In the circumstances of the case, there shall be no order as to costs.

Sd/-
[F.I. REBELLO, J.]

Sd/-
[ANOOP V. MOHTA, J.]